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In The

Supreme Court of the United States

October Term, 1998

RALPH RICHARDSON,

Petitioner,

v.

JANET RENO, Attorney General, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

On December 22, 1998, a panel of the Eleventh Circuit Court of Appeals determined that the statutory writ of habeas corpus is no longer available to review Executive detention of lawful permanent residents; that mandatory detention without the possibility of bond or bail as it pertains to lawful permanent residents with prior convictions is constitutional, that the only review available of the mandatory detention statute is at the end of the immigration removal process when review of detention issues would be meaningless; and that even if such review is not then available because of other preclusion statutes, withdrawing the statutory writ of habeas corpus did not violate the Suspension Clause, the Due Process Clause of the Fifth Amendment, or Article III of the Constitution.

The Petitioner Ralph Richardson is filing a separate petition for a writ of habeas corpus in this Court pursuant to Rule 20 of the Rules of this Court, 28 U.S.C. § 2241, and Article I, section 9, clause 2 of the Constitution. The petition for the writ of habeas corpus has been filed simultaneously with this petition for a writ of certiorari. In both filings, the questions presented for this Court's review are:

1. Whether the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 abolished the statutory writ of habeas corpus, 28 U.S.C. § 2241, as a means to review mandatory Executive detention of lawful permanent residents and, if so, whether the Suspension Clause and the Due Process Clause of the Fifth Amendment of the United States Constitution permit the abolition of such review?

QUESTIONS PRESENTED – Continued

2. Whether the mandatory immigration detention statute under the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, 8 U.S.C. § 1226(c)(1), applies to persons with criminal convictions who completed their sentences long before their immigration detention, and if so, whether the statute, on its face and as applied, violates the Due Process Clause of the Fifth Amendment and the Eighth Amendment's admonition against excessive bail because it permits mandatory detention without possibility of bail or bond for lawful permanent residents who have prior convictions even if they pose no risk of flight or threat to society?

PARTIES

The parties to these proceedings are:

Ralph Richardson, Petitioner

Janet Reno, Attorney General

Doris Meissner, Commissioner, Immigration and Naturalization Service

Robert Wallis, District Director, Immigration and Naturalization Service

United States Immigration and Naturalization Service

United States Department of Justice

Executive Office for Immigration Review, Department of Justice

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PETITION FOR WRIT OF CERTIORARI

The Petitioner, Ralph Richardson, respectfully petitions for a writ of certiorari.

OPINIONS BELOW

The opinion of the Immigration Judge determining he had no jurisdiction to decide Mr. Richardson's request for bond is unreported. (Appendix ("App.") 154-155). The report and recommendation of the United States Magistrate Judge granting the writ of habeas corpus is unreported. (App. 119-132). The decision of the United States District Court for the Southern District of Florida finding that the writ of habeas corpus under 28 U.S.C. § 2241 is not repealed by the Illegal Immigration Reform and Immigrant Responsibility Act and ordering the immigration court to provide Mr. Richardson with an individualized hearing is reported at 994 F.Supp. 1466 (S.D. Fla. 1997) (App. 105-118). On February 23, 1998, the court of appeals granted the respondents' emergency motion for a stay in an unreported order. (App. 104). In this Court, Justice Kennedy denied Mr. Richardson's application to vacate the stay. (App. 103). On December 9, 1998, the court of appeals entered its opinion, which is unreported. On December 22, 1998, the court of appeals entered an amended opinion that is reported at 162 F.3d 1338 (11th Cir. 1998) (App. 1-101). The amended opinion modified the appeals court's original opinion only in minor ways related to the decision of the Ninth Circuit Court of Appeals to vacate its opinion in *Hose v. INS* that the panel had relied upon in this case. (App. 2).

JURISDICTION

The original judgment of the court of appeals was entered on December 9, 1998, and the amended judgment was entered on December 22, 1998. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Reprinted in an appendix to this petition are pertinent portions of the Suspension of Habeas Corpus Clause of the Constitution, the Due Process Clause of the Fifth Amendment, the Eighth Amendment, provisions of Title 8, including 8 U.S.C. §§ 1226(c),(e), 1252(a)(1), 1252(a)(2)(C), and 1252(g), the statutory writ of habeas corpus, 28 U.S.C. § 2241 and 8 C.F.R. §§ 3.19(d),(f), and (g), as well as Petitioner's Amended Application for Writ of Habeas Corpus. (App. 133-153, 156-165). The appendix also includes the Transition Period Custody Rules found at section 303(b)(3) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, Div. C, 110 Stat. 3009-625 and the relevant regulations, 8 C.F.R. § 236.1(c)(1)(i),(c)(5), and (d)(1). These statutory "rules" and the attendant regulations, although no longer relevant to this case, are relevant to the historical background of the case and the current mandatory detention provision under 8 U.S.C. § 1226(c)(1).

STATEMENT

This case presents the core issue of whether a person may be incarcerated without any possibility of bond and then deprived of the right to challenge that mandatory detention in federal court. There are two questions. First, whether an immigration statute interpreted as mandating detention of all lawful resident aliens with certain criminal convictions, without any opportunity for bond or bail, is constitutional. Second, whether Congress has withdrawn the writ of habeas corpus under 28 U.S.C. § 2241, thereby abolishing all review of mandatory detention in these circumstances. The court of appeals determined that such mandatory detention is constitutional, without inquiry into whether the person is a flight risk or a threat to society notwithstanding its recognition that incarcerated lawful permanent residents are protected by the Due Process Clause of the Fifth Amendment. The court of appeals also determined that Congress, in passing the Illegal Immigration Reform and Immigrant Responsibility Act, had withdrawn the writ of habeas corpus under 28 U.S.C. § 2241. It determined that a resident with a prior conviction would either be barred from all

review of his or her detention because of 8 U.S.C. § 1252(a)(2)(C), or would only receive some undefined form of constitutional habeas review at the very end of his or her immigration proceeding, even though such review of incarceration would be illusory and meaningless because the proceeding has ended and the resident alien would either be deported or released.

THE STATUTORY AND REGULATORY SCHEME

In 1996, Congress established a separate provision under the Immigration and Nationality Act ("INA"), section 236(c), for detention and bond for aliens. This statute also contains a mandatory detention provision for aliens, including lawful permanent residents, with prior convictions. Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA"), Pub. L. No. 104-208, Div. C, Title III § 303(a), 110 Stat. 3009-585, 8 U.S.C. § 1226(c)(1). The mandatory detention statute provides that the "Attorney General shall take into custody" persons with prior convictions who may be removable from or inadmissible into the United States because of those convictions and shall not release such persons except in the most limited circumstances. INA § 236(c)(1) and (2), 8 U.S.C. § 1226(c)(1) and (2). Specifically, an incarcerated lawful permanent resident under this statute may only be released if she is a witness in a criminal proceeding or her release is necessary for the protection of a witness and she can demonstrate she is not a flight risk or a threat to the community. *Id.* Other than this limited exception, the traditional criteria concerning whether a person is a flight risk or a threat to society are not considered under the mandatory detention statute. The provision requires the Attorney General to take the non-citizen into custody "when the alien is released, without regard to whether the alien is released on parole, supervised release, or probation, and without regard to whether the alien may be arrested or imprisoned again for the same offense." INA § 236(c)(1), 8 U.S.C. § 1226(c)(1). Although the statute's clear language permits mandatory detention only for persons who are released to the Immigration and Naturalization Service ("INS") *before* completion of their criminal sentences, INS has interpreted it to apply to any lawful permanent resident or other alien with a prior conviction even if he or she,

like the Petitioner, completed his sentence many years before. *See, e.g., Pastor-Camarena v. Smith,* 977 F.Supp. 1415 (W.D.Wash. 1997).

Recognizing the harsh nature of the provision and the potential for disruption of INS objectives, the Attorney General was given the authority to ask Congress for an exemption implementing the mandatory detention provisions for a period of two years. IIRIRA § 303(b)(3). During this two year period, the Attorney General could release certain persons under what were called the Transition Period Custody Rules. The Attorney General exercised her authority to do so, but the "Rules" expired on October 10, 1998, while Mr. Richardson was in custody. His detention therefore continues under the now mandatory detention provisions. (App. 29-30).

Congress also added a different preclusion statute to the bond and detention provisions. INA § 236(e), 8 U.S.C. § 1226(e). This section provides that the Attorney General's discretionary judgment regarding the application of the section "shall not be subject to review." It also provides that: "No court may set aside any action or decision by the Attorney General . . . regarding the detention or release of any alien or the grant, revocation, or denial of bond or parole." *Id.*

The mandatory detention provisions and the provisions concerning custody and bond in general were placed separate and apart from the provisions regarding removal proceedings in IIRIRA. *Compare* INA § 236, 8 U.S.C. § 1226 with INA § 240A, 8 U.S.C. § 1229a. Removal proceedings have their own separate procedures and their own preclusion statutes unrelated to detention and bond. For example, INA § 240 and 240A provide for elaborate procedures governing the initiation of removal proceedings, the nature of the proceedings themselves, and the failure to appear at such proceedings. These are unrelated to the detention and bond proceedings set forth in INA § 236(a) and the attendant regulations, 8 C.F.R. § 236.1. Similarly, removal proceedings have their own provisions, pursuant to which a "final order of removal" may be reviewed only in the court of appeals. *See* INA § 242(a)(1). The statute also includes various preclusion of review provisions separate and apart from INA § 236(e). For example, INA § 242(a)(2)(C) prohibits persons with final orders of removal who

have certain criminal convictions from appealing their cases to the courts of appeals; INA § 242(a)(2)(B)(ii) restricts review of discretionary decisions of the Attorney General; and INA § 242(g) precludes persons with final orders of removal from seeking review of the Attorney General's decision "to commence proceedings, adjudicate cases, or execute removal orders" except as provided in INA § 242.

The statutes separating removal/deportation proceedings from custody and bond proceedings, both in form and substance, recognize a long standing practice of the Department of Justice that custody determinations "shall be separate and apart from, and shall form no part of, any deportation or removal hearing or proceeding." 8 C.F.R. § 3.19(d). Matters concerning bond and custody have separate hearings, separate records, and separate appeals from removal and former deportation proceedings. 8 C.F.R. §§ 3.1(b)(7), 3.19. Even the Board of Immigration Appeals has noted that "bond proceedings differ greatly from other immigration proceedings." *Matter of Valles,* Int. Dec. #3306 (BIA 1996). This separation was also recognized in the manner in which lawful permanent residents or even nonresidents seeking admission could obtain judicial review of detention decisions. Even where statutes mandated the removal of communist aliens, persons facing such removal could separately challenge their detention by a writ of habeas corpus. *Carlisle v. Landon,* 73 S.Ct. 1179 (1953) (Douglas, J.). Similarly, the writ of habeas corpus was traditionally used to review the detention of inadmissible aliens who, like Mr. Richardson, were separately challenging their inadmissibility into the United States. *Jean v. Nelson*, 472 U.S. 846 (1985); *Shaughnessy v. Mezei*, 345 U.S. 206 (1953).

STATEMENT OF THE CASE

The Petitioner, Ralph Richardson, entered the United States in 1968 as a lawful permanent resident at two years of age. (App. 106). He has resided in the United States continuously for thirty-one years. He has a wife and three young children, all of whom are United States citizens. (App. 106). He and his family have lived in Georgia for many years, and it is where he owned and operated a successful professional cleaning service. (App. 106). At the request

of his mother, Mr. Richardson made a 48-hour trip outside of the United States in October, 1997, for the first time since his entry into the country in 1968. (App. 106). Upon his return, he was detained by the INS because of prior convictions, of which he informed INS officials when questioned. (App. 121). Specifically, Mr. Richardson was convicted of carrying a concealed weapon at the age of 18. He was later convicted of a narcotics related felony that included violating his probation. He had been released from all criminal proceedings almost four years before he was arrested at the airport by the INS. (App. 106, 121). Although INS had chosen, upon the completion of his criminal sentence, not to detain Mr. Richardson, on October 27, 1997, the INS incarcerated him at the Krome Detention Center in Miami, Florida "without opportunity for release on bond while it instituted removal proceedings." (App. 106).

On November 13, 1997, Mr. Richardson submitted a letter parole request to the District Director in Miami, Florida, pursuant to section 303(b)(3) of the Transition Period Custody Rules seeking his release pending removal proceedings. (App. 107). The District Director, as the prosecuting official, was authorized to grant temporary parole under INA § 212(d)(5), 8 U.S.C. § 1182(d)(5).

In response to the written parole request, the "Acting Officer in Charge" of the INS detention facility issued a perfunctory written form order denying parole to Mr. Richardson on December 4, 1997.[1] There was no provision for live testimony, witnesses, or an impartial hearing before the District Director as one would normally have in a bond determination and as Department of Justice regulations provide before an immigration judge. 8 C.F.R. § 3.19(d). Several days after submitting the request, Mr. Richardson petitioned the immigration court, pursuant to 8 C.F.R. §§ 3.19(a) and 236.1, to set a reasonable bond. The immigration

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[1] A second, more extensive letter denying parole was presented for the first time to the Magistrate Judge and Mr. Richardson at a December 15, 1997, district court hearing. This *post hoc* litigation document, also dated December 4, 1997, was used to buttress the first letter. It was extensively relied upon by the court of appeals (App. 21-22), although it was never in the record of proceedings before the district court but was merely attached to respondent's brief in the court of appeals.

court determined that it had no jurisdiction to grant Mr. Richardson a bond because he was an "arriving alien" under 8 C.F.R. § 236.1(c)(5)(i). (App. 107, 111)

Mr. Richardson, thereafter, filed a petition for a writ of habeas corpus in the United States District Court for the Southern District of Florida. The original petition and the amended petition for writ of habeas corpus asserted statutory and constitutional claims under the Fifth and Eighth Amendments directed exclusively to Mr. Richardson's detention. Mr. Richardson sought review of the immigration judge's decision to deny his request for a bond hearing. (App. 107-108). As the court of appeals noted, Mr. Richardson did *not* seek review of any INS discretionary decision regarding bond, but instead sought "review of his constitutional claim that denial of bond without a hearing before an immigration judge violates his constitutional rights." (App. 31-32). Mr. Richardson asserted that the immigration judge's and the INS' interpretation of the statute and the regulations, "by wholly depriving lawful permanent residents . . . of the right to present evidence concerning their suitability for bond, deprives them on its face of procedural due process under the Fifth Amendment of the United States Constitution. It also deprives Mr. Richardson of due process as applied because he could easily demonstrate his suitability for bond if given the opportunity to do so." (App. 145). The habeas petition also asserted that Mr. Richardson's "incarceration without bail prior to the determination of his deportability also violates the reasonable bail requirement of the Eighth Amendment." (App. 146). Noting that the "statute does not grant authority to the Attorney General, or any administrative officer, to set bail under any circumstances," Mr. Richardson sought relief because the "refusal to set bail under any circumstance is excessive and in violation of the Eighth Amendment." (App. 146). The habeas petition also challenged Mr. Richardson's detention without bail as violative of substantive due process because "incarceration . . . for months or years, depriving a lawful permanent resident of the United States of liberty, without the requirement of any showing to a judicial officer or even administratively that he should be incarcerated, interferes with rights implicit in the concept of ordered liberty and is shocking to the conscience." (App. 148).

The habeas petition did not address, nor did the Magistrate Judge or the United States District Judge entertain or address, any issues regarding Mr. Richardson's removal proceedings. The INS seeks Mr. Richardson's permanent removal from the United States based upon his conviction for a narcotics-related felony. His removal proceeding and the appeal of that proceeding have continued separately to this day.[2]

At the time Mr. Richardson was detained, the Transition Period Custody Rules were in effect. He argued that: (a) the immigration court, under that statute and as a matter of longstanding constitutional law regarding lawful permanent residents, was required to provide a bond hearing and to issue a reasonable bond, and (b) the INS regulations that characterized Mr. Richardson as an "arriving alien" were ultra vires of the statute and unconstitutional. Both the magistrate judge and the district court judge agreed. Both declined to reach the constitutional issues raised in Petitioner's amended complaint, thereby resolving the case on statutory grounds.

The district court, through Chief Judge Edward B. Davis, first addressed the court's jurisdiction to entertain the writ of habeas corpus. He recognized that there was a strong presumption favoring judicial review of administrative decisions that could only be overcome "by clear and convincing evidence" that IIRIRA stripped the courts of federal jurisdiction to review the right to a bond hearing. (App. 108-109). Recognizing that habeas corpus is subject only to "express" repeal under the "clear statement rule" expressed by this Court in *Felker v. Turpin*, the Chief Judge found that neither INA § 236(e), nor § 242(g) expressly repealed jurisdiction over the writ of habeas corpus. Finding no express repeal because

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[2] Although the court of appeals discussed Mr. Richardson's removal hearing (App. 32-33), it was never an issue in this case, despite the court of appeals' reference to it. The immigration removal hearing and the appeal before the Board of Immigration Appeals were not part of the record in this case. The panel, subsequent to briefing and oral argument on the bond issue here, requested the parties to submit a joint supplemental appendix of the separate removal proceeding, presumably so it could refer to it in the opinion.

the statute "does not even mention habeas corpus," the court declined to find repeal by implication. (App. 109-110).[3]

The district court also rejected the respondents' contention that Mr. Richardson failed to exhaust his administrative remedies. Finding such administrative remedies "futile" and that his continued detention constituted "irreparable harm," the district court concluded that exhaustion was unnecessary.

On the merits, the Chief Judge concluded that respondents' administrative interpretation precluding Mr. Richardson from a bond hearing on the ground that he must be treated like an alien arriving in the United States for the first time "does violence" to the plain meaning of INA § 101(a)(13) and is directly contrary to this Court's decision in *Rosenberg v. Fleuti*, 374 U.S. 449 (1964). Finding that "it is evident from the plain meaning of the statute, the legislative history and the important policy concerns that animated the Court in 1963 that *Fleuti* is still good law" (App. 117), the district court granted the writ of habeas corpus and ordered the immigration judge to provide Mr. Richardson with an individualized hearing. (App. 117-118).

The respondents sought an emergency stay in the Eleventh Circuit, claiming that Mr. Richardson should not be given an individualized hearing, notwithstanding the district court's finding that his detention constituted irreparable harm. A stay was issued on February 23, 1998, and briefing was expedited, although oral argument was not granted until June 16, 1998. The panel rendered its decision on December 9, 1998, which was amended December 22, 1998. (App. 2). During the pendency of the case, the Transition Period Custody Rules expired. As of October 10, 1998, Mr. Richardson's detention is based exclusively on the mandatory

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[3] The district court adopted the magistrate judge's opinion (App. 105), which made more detailed findings concerning the jurisdictional issue. The magistrate judge determined that INA § 242(g) did not apply in this case because it is limited, by its language, to non-bond decisions and to decisions made solely by the Attorney General. (App. 124-125). The magistrate's report and recommendation determined that INA § 236(e) did not preclude Mr. Richardson's claims because that section related only to discretionary decisions of the Attorney General and only to decisions of the Attorney General herself. (App. 123-125).

detention provisions of INA § 236(c)(1). (App. 27-30). Mr. Richardson sought to file a supplemental brief on the issue of his mandatory detention because the statutory issue regarding whether he was an "arriving alien" was no longer before the Court, as INS was now detaining him under INA § 236 (c)(1). The panel denied the motion to submit additional briefing on October 27, 1998 (App. 102), but nevertheless addressed the issue of Mr. Richardson's mandatory detention under INA § 236(c)(1) in its opinion (App. 27-30, 60 n.119).

On December 9, 1998, the panel reversed and vacated the district court judgment. On December 22, 1998, the court amended its opinion in recognition of the fact that the Ninth Circuit's decision in *Hose v. INS,* upon which it had relied, had been vacated. (App. 1-101). It nevertheless maintained the same position as it did in its December 9, 1998, opinion and ordered the reversal and vacation of the district court order.

The panel determined, apparently in dictum, that the district court lacked jurisdiction over removal proceedings. Ignoring the distinction between review of mandatory Executive detention pending removal proceedings and review of removal proceedings themselves, the court determined that IIRIRA placed all review of removal proceedings in the court of appeals. In the panel's view, "Congress has abbreviated judicial review to one place and one time: only in the court of appeals and only after a final removal order and exhaustion of all administrative remedies." (App. 37).

The court also concluded that the statutory writ of habeas corpus under 28 U.S.C. § 2241 has been abolished in regard to Executive detention of resident aliens with certain prior convictions. The court determined that the language of INA § 242(g), although never mentioning detention, bond, or parole, was "plain and clear" (App. 43) and that the phrase "notwithstanding any other provision of law" abolished the writ of habeas corpus because it "sufficiently and clearly encompasses other provisions of law, such as § 2241." (App. 43). The court made this determination notwithstanding INA § 236(e) which directly addressed limitations on judicial review regarding bond and parole. In the court's view, issues of bond and detention were "inextricably part of the removal proceedings" and therefore covered by INA § 242(g). (App. 46-47 n.100). Untroubled by the need to avoid the serious

constitutional question that elimination of the writ of habeas corpus might raise, the panel "reject[ed] this 'constitutional avoidance' approach because the language of INA § 242(g) "in our view, is plain, unambiguous, and yields only one permissible statutory construction" (App. 51) and also because the elimination of habeas jurisdiction over mandatory Executive detention "does not violate the Due Process Clause and Article III [as] neither provision mandates judicial review of immigration decisions." (App. 52).

In addressing the due process issue, the court acknowledged that permanent resident aliens, such as Mr. Richardson, "are protected by the Due Process Clause of the Fifth Amendment." (App. 57). Although the court recognized that Mr. Richardson's narcotics offense "brings him within several mandatory detention categories in INA § 236(c)(1)" and that "he does not fall within the discretionary release option in INA § 236(c)(2)" (App. 29-30), it still found that the elimination of judicial review did not violate due process. Confusing review of detention with review of a final order of removal, the court found that, given the "procedural safeguards" in "removal proceedings," no judicial review is required "to provide the process due to a permanent resident alien facing removal." (App. 59). The panel also determined that due process was not violated if there was no review of the district director's denial of parole (App. 59), although this issue had become irrelevant in light of Mr. Richardson's mandatory detention. However, the panel determined that even if Mr. Richardson were subject to mandatory detention without any review, it would "pose[ ] no constitutional issue." (App. 60 n.119).

Similarly, the panel found that withdrawing all review from the lower federal courts to hear Mr. Richardson's claim of unlawful Executive detention does not violate Article III. In its view, "Article III does not mandate the judicial review of immigration decisions in any inferior court" because "Congress possesses the sole authority to establish the jurisdiction of the inferior federal courts." (App. 61).

The court next turned to the Suspension Clause. It determined that the Suspension Clause is not violated by the elimination of statutory habeas review. It also determined that the statutory bar to circuit court review of final removal orders for aliens with certain

convictions under INA § 242(a)(2)(C) does not violate the Suspension Clause. In reaching its conclusions, the panel maintained that "the Suspension Clause permits Congress to replace habeas corpus with another avenue of judicial review as long as that alternative vehicle is adequate and effective." (App. 89). The court determined that an adequate and effective remedy exists in the court of appeals after a final order of removal to review Mr. Richardson's mandatory detention. (App. 89-95). It determined that INA § 242(a)(2)(C) does not bar review because inquiry may still be made in the court of appeals as to whether Mr. Richardson is an alien, is removable and has committed a criminal offense. The panel believed that an inquiry limited to these questions "goes a long way, and very well may be sufficient in this particular type of case, to provide an adequate and effective collateral judicial review of the validity of Richardson's executive detention and removal order." (App. 96-97). Moreover, the court concluded that even if INA § 242(a)(2)(C) bars review, there would still be review to determine whether "the level of judicial review remaining . . . in a particular case satisfies the Suspension Clause." (App. 100). Deferring this form of review of Mr. Richardson's sixteen-month detention until the entry of a final removal order, in the panel's view, "d[id] not raise substantial constitutional concerns." (App. 87).

On the issue of Mr. Richardson's mandatory detention, the court acknowledged he was subject to mandatory detention (App. 27-30) and that such mandatory detention did not violate the constitution (App. 60 n.119, 100). Without analysis, the court concluded in a footnote that mandatory detention "poses no constitutional issue" (App. 60 n.119) and that Congress' decision to mandate detention while posing "harsh consequences" is "not the result of constitutional violations." (App. 100).

REASONS FOR GRANTING THE WRIT

After sixteen months of seeking administrative and judicial assistance to end what is now mandatory detention, Mr. Richardson invokes the writ of habeas corpus in this Court to seek his immediate release pending final disposition of his removal proceedings, and invokes the writ of certiorari to seek review of the Eleventh Circuit's decision, which has profound implications for

all persons currently detained by the Immigration and Naturalization Service ("INS") awaiting removal proceedings. The decision to forestall review of mandatory detention until the end of the removal process renders such review illusory for Mr. Richardson and the thousands of persons who are being detained indefinitely and conflicts with decisions of other circuit courts and this Court.

I. The Lower Court's Ruling And The Seventh Circuit's Decision In *LaGuerre v. Reno* Directly Conflict With The Decisions Of The First, Second, Third, And Ninth Circuits On The Continuing Availability Of Habeas Relief And The Solicitor General In Seeking Certiorari Of The Circuit Court Decisions Has Acknowledged The Obvious Conflict In The Circuits.

A majority of circuit courts are now split on a significant issue of statutory interpretation that has profound consequences for the continuing viability of the writ of habeas corpus in any aspect of a resident alien's detention in custody. The lower court's decision in this case and the Seventh Circuit's decision in *LaGuerre v. Reno*, ___F.3d___, 1998 WL 912107 (7th Cir. December 22, 1998), are in direct conflict with decisions rendered in the First, Second, and Third Circuits on the question of whether INA § 242(g) has abolished the statutory writ of habeas corpus, 28 U.S.C. § 2241 in immigration proceedings. Based upon *Ex parte Yerger*, 75 U.S. (8 Wall) 332 (1869) and *Felker v. Turpin*, 518 U.S. 651 (1996), the First, Second, and Third Circuits have concluded that INA § 242(g) has not repealed the writ of habeas corpus in immigration proceedings because such repeal cannot occur by implication. The Ninth Circuit, following the now vacated *Hose v. INS*, 141 F.3d 932 (1998), *reh'g en banc granted*, determined that INA § 242(g) was unconstitutional where there was no other avenue for review. Repeal of habeas corpus jurisdiction can only occur by a clear statement from Congress that it expressly intended to repeal habeas jurisdiction, which INA § 242(g) does not do. Certiorari should be granted in this case because it raises the repeal issue regarding a resident alien's physical custody prior to final disposition of a removal proceeding.

In *Goncalves v. Reno*, 144 F.3d 110 (1st Cir. 1998), the First Circuit specifically addressed and rejected the notion that INA § 242(g) repeals habeas jurisdiction under 28 U.S.C. § 2241. In so doing, the court found that the grant of § 2241 relief "has been part of the judicial fabric of this nation since its enactment in the first Judiciary Act" and that "[a]liens in custody of federal immigration officials have traditionally been able to obtain review of immigration decisions by petitioning for a Writ of Habeas Corpus under what is now § 2241." *Id.* at 119-20.

In *Jean-Baptiste v. Reno*, 144 F.3d 212 (2nd Cir. 1998), the Second Circuit Court of Appeals likewise rejected the claim that INA § 242(g) abrogated the right to seek review by writ of habeas corpus in the district court under § 2241. *Id.* at 218-20. Citing to this Court's decisions in *Felker* and *Yerger*, the Second Circuit concluded that "[n]othing in the language of either the Antiterrorism Act or the Immigration Reform Act suggests that Congress expressly repealed § 2241, limited its scope, or eliminated the jurisdiction of the district courts under that statute to entertain petitions seeking writs of habeas corpus." *Id.* at 219.

In *Sandoval v. Reno*, ___ F.3d ___, 1999 WL 31489 (3rd Cir. Jan. 26, 1999), the Third Circuit traced the history of the writ as well as its use in immigration proceedings and concluded that the holding in *Felker* and *Yerger* "apply with equal force" to INA § 242(g). Recognizing the conflict with this case and the recent decision of the Seventh Circuit in *LaGuerre v. Reno*, ___ F.3d ___, 1998 WL 912107 (7th Cir. December 22, 1998), the court noted that the "resulting division among the courts on this important issue leaves the definitive interpretation for resolution by the Supreme Court." *Id.* at *4.

In *Magana-Pizano v. INS*, 152 F.3d 1213 (9th Cir. 1998), the Ninth Circuit faced the issue of whether INA § 242(g), as construed by the Circuit's prior decision barring habeas review, violates the Suspension Clause. The court concluded that: "Given the history of the writ, both in England and as applied in immigration cases in the United States, the answer must plainly be in the affirmative. Indeed, that conclusion is

compelled by *Heikkila* [*v. Barber*, 345 U.S. 229 (1953)]." 152 F.3d at 1220.

The Solicitor General has filed petitions for writs of certiorari in the First, Second, and Ninth Circuit cases raising the issue, and in his reply brief to his petition for certiorari in the Second Circuit decision in *Reno v. Navas* (a case issued subsequent to *Jean-Baptiste*), states forcefully in his "Reasons for Granting the Petition" that the conclusion of the Second Circuit that IIRIRA has not abolished the writ of habeas corpus "conflicts with the decision of the Eleventh Circuit in *Richardson v. Reno.*" Reply Brief for the Petitioners in *Reno v. Navas*, Case No. 98-996 at 19. Thus, this Court's certiorari jurisdiction should be invoked to resolve a conflict among six circuits on an important issue of federal law and the case should be docketed for oral argument.

II. The Lower Court's Decision That The Writ Of Habeas Corpus Under 28 U.S.C. § 2241 Has Been Abolished And May Not Be Used To Review The Constitutionality Of Mandatory Detention Of Long Term Lawful Permanent Residents Directly Conflicts With This Court's Opinions In *Ex Parte Yerger* And *Felker v. Turpin* And Raises An Issue Of Fundamental Importance That Has A Profound Effect On Thousands Of Aliens Currently In Detention

The fundamental right to test the legality of Executive detention in a habeas corpus proceeding is enshrined in the Constitution. U.S. Const. art. I, § 9, cl. 2. This right to habeas corpus, whose object is to liberate those who are unlawfully detained, has been termed "the most important human right in the Constitution."[4] The "Great Writ" has a pre-eminent role in our constitutional system and "is the fundamental instrument

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[4] Zechariah Chafee, Jr., *The Most Important Human Right in the Constitution*, 32 B.U. L. Rev. 143 (1952); *see also*, Gerald L. Neuman, *Habeas Corpus, Executive Detention, and the Removal of Aliens*, 98 Colum.L.Rev. 961, 962 (1998) (writ of habeas corpus "a central constitutional safeguard against lawless arrest.").

for safeguarding individual freedom against arbitrary and lawless state action." *Harris v. Nelson*, 394 U.S. 286, 290 (1969). Seeking to enforce this right, Congress created the lower federal courts and conferred upon them habeas jurisdiction in the Judiciary Act of 1789; that jurisdictional grant is now codified at 28 U.S.C. § 2241. *See Felker v. Turpin*, 518 U.S. 651, 659 & nn.1, 2 (1996) (the habeas provision of the Judiciary Act of 1789 applied to persons in the custody of the United States and "is the direct ancestor of § 2241.").

Throughout our history, this Court has recognized the preeminent role that the statutory writ of habeas corpus has played in safeguarding individual liberty during pretrial detention, even where treason was charged. *Ex parte Bollman*, 8 U.S. (4 Cranch) 75, 125 (1807). The Great Writ and the statutory means to effectuate it has been recognized as "a high prerogative writ, known to the common law, the great object of which is the liberation of those who may be imprisoned without sufficient cause." *Ex parte Watkins*, 28 U.S. (8 Peters) 193, 202 (1830). The protection of the writ has been extended not only to citizens, but also to aliens throughout the history of the Republic, and to aliens in federal immigration proceedings for as long as there have been federal immigration laws. *Jean v. Nelson*, 472 U.S. 846 (1985); *Shaughnessy v. Mezei*, 345 U.S. 206 (1953); *Nishimura Ekiu v. United States*, 142 U.S. 651 (1892); Neuman, *Habeas Corpus, Executive Detention and the Removal of Aliens*, *supra* at 989-1020.

The lower court's interpretation of INA § 242(g), as precluding review under the writ of habeas corpus of mandatory detention decisions directly conflicts with this Court's decisions in *Ex parte Yerger*, 75 U.S. (8 Wall) 332 (1869) and *Felker v. Turpin*, 518 U.S. 651 (1996). In *Yerger* and *Felker* this Court established the principle that the writ of habeas corpus may not be repealed unless Congress explicitly repealed it because the Court would not imply a repeal. In *Yerger*, 75 U.S. at 337 this Court determined that habeas extended to all cases except those "expressly excepted from it." In *Felker*, 518 U.S. at 660, the Court said that the elimination of the writ of habeas corpus could not proceed

through "repeal by implication" because such practice is "disfavored."

The court of appeals violated the "clear statement rule" in *Yerger* and *Felker* by misreading and misapplying INA § 242(g) to detention matters. The language and purpose of INA § 242(g) is unrelated to questions concerning detention. Matters concerning "decision[s] or action[s] to commence proceedings, adjudicate cases or execute removal orders" pertain to the conduct of removal proceedings, not detention pending removal proceedings. The lower court focused exclusively on the language in INA § 242(g) relating to the preclusion of review (App. 40-48), but ignored the language in that statute regarding the governmental action the statute was precluding from review. INA § 242(g) only bars review of "the decision or action by the Attorney General to commence proceedings, adjudicate cases, or execute removal orders. . . . " The constitutional issue of the illegality of Mr. Richardson's detention does not involve any "decision or action" of the Attorney General. It does not involve any decision "to commence proceedings." It does not involve any decision to "adjudicate cases." And it does not involve any decision to "execute removal orders."

Moreover, the placement of INA § 242(g) in the section concerning "Judicial Review of Orders of Removal" and the purpose of INA § 242 to channel *removal proceedings* to the courts of appeals are unrelated to challenging mandatory detention prior to completion of removal proceedings. *Almendarez-Torres v. United States*, ___ U.S. ___, 118 S.Ct. 1219, 1226 (1998) (the heading of a section is relevant in determining its meaning). There is no delay to the removal process if a separate challenge to detention is allowed. The removal proceeding moves forward, as it has in Mr. Richardson's case, in a separate proceeding before the immigration judge and then the Board of Immigration Appeals. The purpose of INA § 242 is therefore complimented, but not thwarted, by separate habeas review of Executive detention in the district court.

The lower court reached its conclusion by ignoring the language of INA § 242(g) concerning "commenc[ing] proceedings, adjudicat[ing] cases and execut[ing] removal orders." In its ninety-nine page opinion, the lower court never addressed the meaning of those words stating only that "the

language of INA § 242(g) is plain and clear." (App. 43). It conflated removal proceedings with mandatory custody determinations. (App. 46-47 n.100). In a single footnote, it dismissed the central issue in the case – that detention and removal proceedings are separate and distinct – by simply stating: "We disagree." It wrongly characterized detention issues as "interim orders and actions," and baldly concluded that detention is "inextricably part of the removal proceedings and covered by the broad language of INA § 242(g)." (App. 46-47 n.100). The panel's characterization of INA § 242(g) as covering detention decisions, however, directly conflicts with *Yerger* and *Felker*.

Its assertion that the language of INA § 242(g) is "broad" enough to encompass detention proceedings directly conflicts with and ignores the rule in *Yerger* and *Felker* that the venerable writ may not be abolished unless "expressly excepted" from the statute. Nothing in INA § 242(g) or the legislative history permits a finding that it "expressly except[s]" habeas corpus from the review of *detention* decisions. H.R. Conf. Rep. 104-208, 104th Cong. 2nd Sess. at 221 (Sept. 24, 1996). Whether a permissible construction of INA § 242(g) might include detention is not at issue. Under *Yerger* and *Felker*, it must expressly provide for preclusion of detention decisions for this Court to conclude that habeas corpus has been abolished.

Additionally, the lower court ignored the extensive regulatory scheme, 8 C.F.R. § 3.19(d), and legal authority, *Matter of Valles*, Int. Dec. #3306 (BIA 1996) ("bond proceedings differ greatly from other immigration proceedings"), consistently acknowledging that detention and bond were separate and distinct matters from removal/deportation proceedings. Under *Cheng Fan Kwok v. INS*, 392 U.S. 206 (1968), and its progeny, issues concerning bond were never reviewable in the court of appeals because they were not encompassed within the definition of a "final order" of removal. The lower court ignored long standing principles of statutory construction in the immigration field concerning the meaning of the term "final order."

Similarly, this Court and the lower courts have never treated bond and detention matters in immigration as "inextricably part of the removal proceeding," as the lower court asserted. *See, e.g.*,

Reno v. Flores, 507 U.S. 292 (1992); *National Center for Immigrants Rights v. INS*, 481 U.S. 1009 (1987); *Jean v. Nelson, supra; Gornicka v. INS*, 681 F.2d 501, 505-06 (7th Cir. 1982) ("Thus it is clear bond hearings are separate and apart from deportation hearings. . . . Whether or not bond is required has no bearing on whether a final order of deportation will be entered. A bond determination is not a final order of deportation, is not made during an administrative proceeding under § 1252(b) and does not effect the deportation proceeding."). As bond and detention matters have always been construed to be outside of and distinct from "final orders" of removal/deportation, they cannot be reviewed under INA § 242(a) and therefore are not precluded under INA § 242(g).

Further, the panel ignored that INA § 236 directly addresses detention and bond and contains its own preclusion statute, INA § 236(e). Congress' own statutory scheme makes INA § 242(g) irrelevant in determining bond issues. "Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposefully in the disparate inclusion or exclusion." *INS v. Cardoza-Fonseca*, 480 U.S. 421, 432 (1987). *See Bailey v. United States*, 516 U.S. 137, 145 (1995).

INA § 236(e) precludes only the "Attorney General's discretionary judgment" and "any action or decision" by the Attorney General regarding bond, detention, and parole and therefore is inapplicable in this case. Mr. Richardson does not challenge any decision or action of the Attorney General herself. He challenges his mandatory detention under INA § 236(c)(1), which the Attorney General has no authority to alter or amend. Moreover, INA § 236(e) is devoid of the "notwithstanding any other provision of law" language that the lower court found persuasive in concluding that INA § 242(g) had abolished habeas jurisdiction under § 2241 (App. 43).[5]

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[5] The panel opinion also raised other issues which this Court need not address if it determines that INA § 242(g) is inapplicable and INA § 236(e) does not bar review. The lower court, for example, found that deferring review of Mr. Richardson's detention until there was a final order of removal under INA § 242(a) was an "adequate and effective" remedy

The lower court's ruling is not an isolated decision affecting only Mr. Richardson. As of August 1998, the INS was detaining over 1400 aliens in the states of Florida, Georgia, and Alabama. *Daily Population Report for August, 1998,* INS Eastern Region, Detention and Deportation Division. As these detention statistics were generated prior to the mandatory detention provisions that went into effect in October, 1998, the current number of detainees in INS custody in the Eleventh Circuit is undoubtedly far higher. Under the lower court's ruling, none of the thousands of people who have been detained since December 22, 1998, have any meaningful judicial review of their detention. They may only challenge it, if at all, at the end of the removal proceeding after they have remained in detention for months or years. Of course, at that point, review is wholly illusory because they will have either won their cases and been released or lost and been deported. Detentions that may be premised on completely unlawful grounds such as race or national origin, *see, e.g., Jean v. Nelson,* 472 U.S. at 857 (release decisions must be made "without regard to race or national origin"), or detentions of persons who claim to be United States citizens, have no effective review.

III. The Lower Court's Determination That Mandatory Detention Of Resident Aliens Pending Removal Proceedings Poses No Constitutional Issue Directly Conflicts With This Court's Decisions And Jurisprudence Regarding The Substantive And Procedural Due Process And Eighth Amendment Rights Of Incarcerated Resident Aliens

The Due Process Clause of the Fifth Amendment of the United States Constitution provides that: "No person shall be . . . deprived of life, liberty, or property, without due process of

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under *Swain v. Pressley,* 430 U.S. 372, 383-84 (1977). But waiting until there is a final order of removal to seek review of detention renders such review illusory. Either Mr. Richardson wins his case at the final order of removal and is released or he loses his case and is deported. Thus, there is no review at all of Mr. Richardson's detention pending a final order under the lower court's analysis.

law." This Court has held that the Due Process Clause has substantive and procedural components that protect persons against unlawful government action. *United States v. Salerno,* 481 U.S. 739, 746-47 (1987). Substantive due process protects persons from government conduct that "shocks the conscience," *Rochin v. California,* 342 U.S. 165, 172 (1952), or interferes with rights "implicit in the concept of ordered liberty," *Palko v. Connecticut,* 302 U.S. 319, 325-26 (1937). If the government's actions comport with substantive due process, they must still be implemented in a procedurally fair manner. *Mathews v. Eldridge,* 424 U.S. 319, 335 (1976).

As a lawful permanent resident, Mr. Richardson is protected by the Due Process Clause of the Fifth Amendment. *Reno v. Flores,* 507 U.S. 292, 306 (1993); *Accardi v. Shaughnessy,* 347 U.S. 216 (1954); *Bridges v. Wixon,* 326 U.S. 135 (1945). As the lower court noted, "[a]t the core of the alien's due process rights is the right to notice of the nature of the charges and a meaningful opportunity to be heard. *See, e.g., Kwong Hai Chew v. Colding,* 344 U.S. 590, 596-98 (1953)." (App. 58).

The lower court also recognized that Mr. Richardson was now subject to mandatory detention under INA § 236(c)(1) (App. 30), but found that such mandatory detention did not violate the Constitution. (App. 60, n.119). The court determined that: "Congress acts well within its plenary power in mandating detention of a criminal alien with an aggravated felony conviction facing removal proceedings." *Id.*

A. Mr. Richardson's Continued Detention Conflicts With This Court's Decision In *Foucha v. Louisiana* And The Court's Jurisprudence Concerning Substantive Due Process Rights Of Adults Subject To Detention

There is no doubt that "[f]reedom from bodily restraint has always been at the core of the liberty protected by the Due Process Clause from arbitrary governmental action." *Foucha v. Louisiana,* 504 U.S. 71, 80 (1992). This Court has repeatedly recognized the "importance and fundamental nature" of liberty from bodily

restraint and that "[i]n our society liberty is the norm, and detention prior to trial or without trial is the carefully limited exception." *United States v. Salerno*, 481 U.S. 739, 755 (1987).

The deprivation of Mr. Richardson's liberty where he is not given the opportunity to demonstrate before a neutral magistrate that he poses no risk of flight or threat to society violates substantive due process and conflicts with this Court's decision in *Foucha v. Louisiana*. In *Foucha*, this Court found that the statutory scheme established by Louisiana for the release of persons from mental institutions who were acquitted by reason of insanity violated procedural and substantive due process because persons could be detained without "an adversary hearing at which the State must prove by clear and convincing evidence that he is demonstrably dangerous to the community. Indeed, the State need prove nothing to justify continued detention for the statute places the burden on the detainee to prove he is not dangerous." 504 U.S. at 81-82.

Under INA § 236(c)(1), the resident alien is similarly detained without any evidence that he currently poses a danger to the community or is likely to flee. The Attorney General has no burden to prove any facts warranting detention. Mr. Richardson is not even given a hearing before a neutral magistrate, as in *Foucha*, where he may prove his suitability for release.

The mandatory detention statute, here, also fails to meet even the lesser standards established by this Court in *United States v. Salerno* when it upheld a pretrial detention statute for criminal detainees. In *Salerno*, the government "[i]n addition to first demonstrating probable cause . . . was required, in a 'full-blown adversary hearing' to convince a neutral decisionmaker by clear and convincing evidence that no conditions of release can reasonably assure the safety of the community or any persons, i.e. that the 'arrestee presents an identified and articulable threat to an individual or the community' " before he may be detained. *Foucha*, 504 U.S. at 81. Furthermore, the duration of confinement was strictly limited as the Speedy Trial Act provided stringent time limitations for pretrial detention.

IIRIRA's mandatory detention provision does not meet any of these minimal standards. Mr. Richardson has no right to a hearing where the burden is upon the INS to determine by clear and convincing evidence that he poses a risk of flight or a threat to

society. Nor is Mr. Richardson given the benefit of the Speedy Trial Act so that his detention may be of limited duration. Indeed, Mr. Richardson, even after 16 months of detention, still has no final order of removal entered against him.

In *Salerno,* the government also had a "legitimate and compelling" interest "in preventing crime by arrestees" when they could determine by clear and convincing evidence that they posed a threat. Here, no such interest is manifest. Under INA § 236(c)(1), as interpreted by the Attorney General, Mr. Richardson and other resident aliens, are subject to mandatory detention even if they were long ago convicted of a crime, their sentences completed, and they are fully rehabilitated.

INA § 236(c)(1), as interpreted by the Attorney General, is punitive as understood in *Salerno* and as applied to Mr. Richardson. The legislative history of the statute, like its explicit language, suggests that it was directed at persons who were being released from criminal confinement. H.R. Conf. R. 104-828, 104th Cong. 2nd Sess at 210-211 (September 24, 1996) ("This detention mandate applies whenever such an alien is released from imprisonment, regardless of the circumstances of the release."). If the statute was designed to expedite the removal of criminal aliens or protect the public from them by removing criminal aliens who are completing prison sentences directly into immigration detention and immigration removal proceedings that purpose is not met here. There was no showing in the record or legislative history that persons with prior convictions who have been released for a number of years and/or are fully rehabilitated would otherwise harm the public or flee. Nor does it ensure that a person's removal hearing will be expedited because, as in Mr. Richardson's case, there is no time limitation under INA §§ 236(c)(1) or 242 for the completion of such a hearing. As ordered here, there has been no narrow tailoring of the statute to serve a compelling state interest, as the Due Process Clause requires when infringing on a fundamental liberty interest. *See, e.g., Collins v. Harker Heights,* 503 U.S. 115, 125 (1992).[6]

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[6] Cases as *Reno v. Flores,* 507 U.S. 292 (1993) or *Carlson v. Landon,* 342 U.S. 524 (1952) are not to the contrary. *Flores* recognized the

B. Mr. Richardson's Continued Detention Also Violates This Court's Longstanding Jurisprudence Concerning Procedural Due Process

The lower court's conclusion that mandatory detention in Mr. Richardson's case "poses no Constitutional issue" also conflicts with long standing precedent of this Court. Mr. Richardson's procedural due process rights are similarly violated because INA § 236(c)(1) provides no procedure to assert the traditional criteria for bond. Under long standing practice and administrative law, an alien generally "should not be detained or required to post bond except on a finding that he is a threat to the national security . . . or that he is a poor bail risk." *Reno v. Flores,* 507 U.S. 292, 295 (1993) (*quoting Matter of Patel,* 15 I&N Dec. 666 (1976)). The statute here,

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fundamental liberty interest in freedom from physical restraint, 507 U.S. at 302, but found that because juveniles were "always in some form of custody," 507 U.S. at 302-03, they did not have a fundamental right to liberty that required a narrowly tailored compelling state interest as in *Salerno. Id.* Similarly, *Carlson*, although often cited for the broad proposition that there is no constitutional barrier to detain potentially dangerous resident aliens, actually supports Mr. Richardson's position. Carlson was detained under a statute that gave the Attorney General, unlike here, the discretion to decide who would be detained. The Attorney General exercised the discretion to detain rarely, as this Court noted more than once in its opinion. *Carlson,* 342 U.S. at 538 n. 31 ("It is quite clear . . . that detention without bond has been the exception) and at 542 ("[A] report filed with this Court by the Department of Justice in this case at our request shows allowance of bail in the large majority of cases"). The *Carlson* Court upheld the statute because it permitted the Attorney General to grant bail *as a matter of discretion.* In so doing, this Court noted that the "purpose to injure could not be imputed generally to all aliens." *Id.* at 538. Moreover, the Attorney General's discretion under *Carlson* was subject to judicial review, a review the decision below effectively foreclosed. This Court recognized that "the Attorney General is not left with untrammeled discretion as to bail. Courts review his determination. Hearings are had, and he must justify his refusal of bail." *Id.* at 543. In contrast, INA § 236 provides for no discretion to grant bail, except in the case of a government witness and, under the lower court's interpretation, no review.

however, provides no right to a hearing before a neutral immigration judge to determine these issues.

A fundamental requirement of due process is the opportunity to be heard "at a meaningful time and in a meaningful manner." *Armstrong v. Manzo,* 380 U.S. 545, 552 (1965). The Due Process Clause requires that the government may not deprive a person of a fundamental liberty interest without providing a fair procedure to do so. *Mathews v. Eldridge,* 424 U.S. 319 (1976). The denial of any hearing before a person may be detained for prolonged or indefinite periods of time deprives that person of procedural due process because the "right to be heard before being condemned to suffer grievous loss of any kind, even though it may not involve the stigma and hardships of a criminal conviction, is a principle basic to our society." *Joint Anti-Fascist Comm. v. McGrath,* 341 U.S. 123 (1951) (Frankfurter, J., concurring).

The mandatory nature of INA § 236(c)(1) deprives Mr. Richardson of any hearing before a neutral party or any party to plead the basis for release. This total lack of procedure cannot withstand a *Mathews v. Eldridge,* 424 U.S. 319, 334-35 (1976), analysis. *Mathews* requires the Court to consider: (1) the private interest affected by the official action; (2) the risk of an erroneous deprivation of the interest, and the value, if any, of additional or substitute procedural safeguards; and (3) the government's interest, including the fiscal and administrative burdens the additional or substitute procedural requirements would impose. *Mathews,* 424 U.S. at 335. The interest in being free from unlawful restraint is not only weighty, but "fundamental." *Salerno,* 481 U.S. at 750; *Foucha,* 504 U.S. at 80. The risk of error, where no procedure is employed, is obvious and is in stark contrast to procedures found constitutional in *Salerno.* In *Salerno,* this Court found the statute constitutional because the hearing was held before a judicial officer in the context of a full evidentiary hearing, where the detainee had a right to counsel and the government had to prove dangerousness by clear and convincing evidence.

In contrast, INA § 236(c)(1) places no burden on the government to prove anything; nor does it even allow the resident alien to demonstrate that, pending a final order, he is not a risk of flight or a threat to the community. Finally, the burden to the government if it were required to maintain such a hearing is minimal. A bond hearing, already contemplated under INS regulation 8 C.F.R. § 3.19(d), is brief and routinely administered. Moreover, Mr. Richardson would, under BIA precedent, have the burden to demonstrate his fitness for release. *Matter of Drysdale*, 20 I&N Dec. 815 (BIA 1994). An individualized hearing on bond that traditionally has been accorded resident aliens has not been constitutionally supplemented by INA § 236. *See, e.g., Martinez v. Greene*, ___ F.Supp. 2d ___, 1998 WL 879834 (D. Colo. Dec. 14, 1998).[7]

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[7] The lower court inexplicably engaged in the *Matthews* analysis in regard to Mr. Richardson's initial request for parole before the district director (App. 59-61) notwithstanding its recognition that Mr. Richardson was now subject to mandatory detention and that the district director had no authority to grant release. (App. 28-30). The paper request for parole and the denial for that request before Mr. Richardson was subjected to mandatory detention does not satisfy *Mathews* for several reasons. First, a parole request is made to the *prosecuting* officer – the district director – and is only a letter request without formal procedures. There is no review before a neutral party where witnesses may be presented and evidence taken, and the burden is on the alien to show that he deserves parole. Furthermore, the lower court, without any basis, determined that Mr. Richardson's liberty interest in being free from restraint is "slightly attenuated given his resident alien status" (App. 59-60) and that the risk of erroneous deprivation was low, because "counsel was able to make written bond and parole requests." However, this Court has said that procedural due process requires more extensive procedures in circumstances where the interests at stake were not as serious as incarceration. *See, e.g., Fuentes v. Shevin*, 407 U.S. 67 (1972); *Bell v. Burson*, 402 U.S. 535 (1971); *Goldberg v. Kelly*, 397 U.S. 254 (1970). The lower court also misconstrued the issue concerning the administrative burden on the Department of Justice in maintaining bond hearings. It determined that the paper parole request was adequate by conflating, once again, matters concerning detention and removal. The panel found that the INS bond and parole procedures "must be evaluated in light of the many procedural safeguards in the overall

C. Mr. Richardson's Detention Conflicts With And Violates The Eighth Amendment

The lower court concluded that the Eighth Amendment is not violated by mandatory detention by relying on this Court's statement in *Carlson v. Landon,* 342 U.S. at 545, that the "Eighth Amendment has not prevented Congress from defining the classes of cases in which bail shall be allowed." The lower court's brief analysis, however, ignored the circumstances in this case and the language of INA § 236(c)(1). Although Congress is free to determine certain classes of people who may be detained without violating the excessive bail requirement of the Eighth Amendment, this case does not involve that issue. Here, the mandatory detention statute is applied to Mr. Richardson by virtue of the INS' erroneous view that INA § 236(c)(1) applies to a broader group of persons than aliens being released from their criminal sentences. It is by virtue of the INS' interpretation of the statute, and not the intent of Congress, that Mr. Richardson is mandatorily denied all bail.

The "excessive bail" requirement, if it means anything, must mean that bail must be reasonably related to the underlying purpose of the statute. "Thus, when the Government has admitted that its only interest is in preventing flight, bail must be set by a court at a sum designed to ensure that goal, and no more." *Salerno,* 481 U.S. at 754. In *Stack v. Boyle,* 342 U.S. 1, 5 (1951), this Court recognized, therefore, that "[b]ail set at a figure higher than an amount reasonably calculated [to

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removal proceedings." (App. 60-61). But those procedural safeguards do not address bond in any fashion because bond proceedings are "separate and apart" from removal proceedings. 8 C.F.R. § 3.19(d). It also erroneously conflated "the volume of arriving aliens," which include those seeking admission for the first time, with resident aliens such as Mr. Richardson, in claiming that immigration judge hearings would overburden the system. And it ignored the fact that, traditionally, bond hearings were routinely given to returning lawful permanent residents without additional burdens to the immigration system.

ensure the defendant's presence at trial] is 'excessive' under the Eighth Amendment."

In the present case, the absence of any bail to a person who has been released for a number of years before being subject to mandatory detention is excessive because it is not reasonably related to the statute's purposes. On its face, INA § 236(c)(1) would ensure the transfer or release of persons from criminal to immigration detention. Persons completing criminal sentences are thought less likely to have ties in the community, are potentially more likely to flee, and because of the proximity of their convictions to their release are perhaps more likely to engage in recidivist behavior and thus be a threat to society upon release. Whether the mandatory detention for such persons is excessive under the Eighth Amendment is a separate issue. However, INA § 236(c)(1), as applied to Mr. Richardson, violates the "excessive bail" provision because his mandatory re-detention after having been released for a number of years clearly does not effectuate the goals of the statute.

IV. The Court Should Grant Certiorari In This Case And Not Defer Decision Pending Resolution Of Other Cases Because This Case Allows The Court To Address Both The Constitutionality Of Mandatory Detention As Well As The Continued Existence Of The Writ Of Habeas Corpus To Challenge Immigration Detention Decisions

At the present time there are petitions for certiorari pending in this Court submitted by the Solicitor General regarding the conflict in the circuits concerning the continued availability of the writ of habeas corpus in removal proceedings. None of those petitions raise the separate issue raised in this case regarding the constitutionality of IIRIRA's mandatory detention statute under INA § 236(c)(1) and the continued existence of habeas corpus over immigration detention decisions.

This case presents a unique opportunity to resolve two important questions currently being addressed in the lower courts: (1) Whether INA 242(g) has abolished the writ of habeas corpus in detention matters; and (2) Whether INA § 236(c)(1) mandating the incarceration of resident aliens with certain convictions is constitutional.

If the Court holds this case pending review of the Solicitor's petitions in the First, Second and Ninth Circuit cases, the resolution of any one of those cases would not completely dispose of this case for two reasons. First, this case arises in the context of the separate issue of detention pending removal proceedings. Thus, even if the Court determines that INA § 242(g) is applicable in some form to removal proceedings, it would not resolve whether it is applicable to issues of detention pending removal proceedings. Second, a resolution of any one of the other cases will not address the issue of mandatory detention. Issues of judicial economy would suggest that the Court also take this case.

Nor will this case be resolved completely by *Reno v. American-Arab Anti-Discrimination Committee*, No. 97-1252, currently pending in this Court. Although *American-Arab* addresses the issue of INA § 242(g), it does so in the context of removal proceedings, not detention decisions. It also does not address the continuing viability of habeas corpus jurisdiction in the district courts in regard to matters outside of the removal process. Holding this case pending resolution of *American-Arab Anti-Discrimination Committee* will therefore not resolve all of these issues in this case even if the Court were to determine that INA § 242(g) affects removal proceedings.

CONCLUSION

For the reasons stated above, this Court should issue a writ of certiorari to the Eleventh Circuit, reverse the Circuit's holdings that jurisdiction under 28 U.S.C. § 2241 has been repealed and that mandatory detention under INA § 236(c)(1) applies to Mr. Richardson and is constitutional, and order this

case remanded to the district court to issue a writ of habeas corpus for Mr. Richardson's immediate release from confinement.

Respectfully submitted,

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